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SHORT FORM ORDER

mod

SUPREME COURT - STATE OF NEW YORK

Present:

HON. UTE WOLFF LALLY,

Justice

TRIAL/IAS, PART 8
NASSAU COUNTY

ADRIAN R. GUTIERREZ and PATRICIA RODRIQUEZ,

Plaintiff(s),

MOTION DATE: 2/27/07

INDEX NO.: 1605/04

-against-

SEQ. NO. 6

CAL. NO. 2006H3367

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ROCKVILLE CENTRE POLICE DEPARTMENT and RANDY DODD,

Defendant(s)

The following papers read on this motion :

Notice of Motion/ Order to Show Cause.....	1-4
Answering Affidavits.....	5,6
Replying Affidavits.....	7,8
Briefs:	

Upon the foregoing papers, it is ordered that this motion by defendants Rockville Centre Police Department ("Rockville Centre") and Randy Dodd ("Dodd") for an order pursuant to CPLR 3211 granting summary judgment on the issue of liability only dismissing plaintiff's complaint against them is denied. Defendants' alternative motion for an order pursuant to CPLR 3212 granting summary judgment dismissing plaintiffs' complaint on the ground that the injuries alleged by the plaintiffs do not satisfy the "serious injury" threshold requirement of Insurance Law Sec. 5104(a) as defined in Insurance Law Sec. 5102(d) is granted.

This is an action to recover money damages for personal injuries allegedly sustained by the plaintiffs in an automobile accident which occurred on August 3, 2003, as the result of defendants' negligence. Adrian Gutierrez owned and operated a motor vehicle in which Patricia Rodriguez was a passenger. Plaintiffs' vehicle was struck by a motor vehicle operated by defendant Randy

Dodd at or near the intersection of Sunrise Highway and Ocean Avenue in the Village of Rockville Centre, New York. At that time, Dodd was acting within the scope of his employment as a police officer and an employee of the Incorporated Village of Rockville Centre. Rockville Centre admits that it owned and maintained the motor vehicle.

Dodd asserts that, while in the scope of his employment as a police officer, he was operating an unmarked car and was stopped at a red light on Sunrise Highway at the North Center Avenue intersection in Rockville Center. It was there that he first noticed plaintiffs' car stopped immediately in front of him in the middle lane of the three westbound lanes. While the traffic light was still red plaintiff proceeded to pass the intersection. Defendant claims to have immediately turned on the emergency lights and siren for the purpose of pulling plaintiffs' vehicle over. Plaintiffs' vehicle had traveled five to seven hundred yards at 30 miles per hour before the collision occurred as plaintiffs vehicle changed lanes from the middle lane into the left lane.

Gutierrez has failed to provide any discovery, appear for an examination before trial or a medical examination by a physician designated by defendant, in violation of this court's order. Therefore, defendants' motion to strike plaintiff Gutierrez's, complaint is herewith granted. This relief is also warranted as plaintiffs' counsel has affirmed that he has lost contact with Gutierrez. Thus, in light of plaintiff's willful, deliberate and contumacious conduct, his complaint as against defendants is stricken (**Viteritti v. Gelfand**, 289 AD2d 566; **Garcia v. Kraniotakis**, 232 AD2d 369]).

Rodriguez asserts that at no time prior to the collision on August 3, 2003 did she hear any sirens or see any emergency lights on any vehicles. Furthermore, she claims that she never saw the defendant's vehicle prior to the occurrence and she does not know how the accident itself happened. Finally, as to damages, she stated that on February 25, 2001 she had fallen from a third floor balcony onto a car, landed on her back and sustained injuries to her lower back and left leg and became disabled for about six months.

Defendants herein seek summary judgment, citing Vehicle and Traffic Law § 1104.

Pursuant to the law of the State of New York, a driver of an "emergency vehicle," engaged in an "emergency operation," has a qualified privilege to disregard the ordinary rules of prudent and responsible driving (Vehicle and Traffic Law §1104; see also **Criscione v. City of New York**, 97 NY2d 152). In this context, a police officer may only be held liable if the officer demonstrates a "reckless disregard" for the safety of others, which is defined as the conscious or intentional "do[ing] of an act of an unreasonable character in disregard of a known or obvious risk so great as to make it highly probable that harm would follow" and done with "conscious indifference to the outcome" (**Saarinen v. Kerr**, 84 NY2d 494, 501; quoting **Prosser and Keeton**, Torts §34, at 231 [5th ed.]). A momentary lapse of judgment is insufficient to establish "the level of recklessness required of the driver of an emergency vehicle in order for liability to attach" (**Szczerbiak v. Pilat**, 90 NY2d 553, 557; see **Saarinen v. Kerr**, supra at 502).

The operator of the emergency vehicle may rely on the statutory exemptions from traffic regulations only if the vehicle's audible signals and visible red lights are activated while the vehicle is in motion (VTL §1104[c]).

Based on the foregoing, this Court finds that the defendant's vehicle, albeit unmarked, constituted an "authorized emergency vehicle" and that it was being operated in the scope of his employment. Thus, defendant, in the summary judgment motion, has demonstrated a Prima Facie entitlement to the relief sought.

Plaintiffs, in order to defeat the motion, bear the burden of establishing that the driver of the authorized emergency vehicle, defendant Dodd, intentionally drove in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow and that he did so with conscious indifference to the outcome (**Saarinen v. Kerr**, supra; **Molinari v. New York**, 267 AD2d 436). Rodriguez, as the party opposing the motion must produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact requiring a trial (**Alvarez v. Prospect Hosp.**, 68 NY2d 320).

In opposition, plaintiff Rodriguez submits that she did not ever see plaintiff Gutierrez run a red light, she did not hear any type of siren nor did she see any type of emergency lights on any vehicles prior to the collision. In light of the foregoing, whether defendant Officer Dodd engaged his emergency lights and siren while pursuing the plaintiffs down the center lane of Sunrise Highway is an issue of fact to be decided by a jury. Whether Officer Dodd's conduct rises to the level of reckless disregard for the safety of others is a question of fact for the jury. Accordingly, defendants' motion for summary judgment dismissal of plaintiffs' complaint on the grounds of liability is denied (**Jastrzebski v. North Shore School Dist.**, 223 AD2d 677; order aff'd, 88 NY2d 946).

So much of defendants' motion which alternatively seeks summary judgment on the grounds that Rodriguez, has not sustained a serious injury is granted.

Rodriguez claims that as a result of the accident she sustained a 7-mm linearly oriented signal abnormality in the posterior left periventricular white matter and a 5-mm similar appearing lesion in the right posterior periventricular white matter; straightening of the cervical spine, cervical radiculitis, lumbar strain, and tension headache.

On a motion for summary judgment for the failure to sustain a "serious injury" within the meaning of Insurance Law §5102(d), the movant must make a prima facie case showing that the injured plaintiff did not sustain a "serious injury" within the meaning of the statute. Once this is established, the burden shifts to the plaintiff to come forward with evidence to overcome the defendant's submissions by demonstrating a triable issue of fact that a "serious injury" was sustained (see **Pommels v. Perez**, 4 NY3d 566; see also **Grossman v. Wright**, 268 AD2d 79, 84).

In support of their instant motion defendants submit the affirmed report of Dr. Edward A. Toriello, M.D., FACS, an orthopedic surgeon who examined the plaintiff, Patricia Rodriguez, on behalf of the defendants on September 6, 2006, more than three years after the date of the subject accident.

Dr. Toriello, opines of his September 6, 2006 examination of the plaintiff, in pertinent part, as follows:

CURRENT COMPLAINTS: The claimant continues to complain of neck pain.

CERVICAL SPINE: Examination of the cervical spine reveals bilateral lateral bending of 45 degrees (normal is 45 degrees), bilateral rotation of 80 degrees (normal is 80 degrees), flexion of 70 degrees (normal is 70 degrees), extension of 60 degrees (normal is 60 degrees). There is no evidence of paracervical muscle spasm or atrophy. There are no motor or sensory deficits in the upper extremities and vascular examination of the upper extremities is within normal limits. Deep tendon reflexes are intact and symmetrical. There is no muscle atrophy in the upper extremities.

RIGHT SHOULDER: Examination of the right shoulder reveals abduction and flexion of 170 degrees (normal is 170 degrees), internal rotation to T12 (normal is to T12), external rotation of 90 degrees (normal is 90 degrees) and adduction of 45 degrees (normal is 45 degrees). There is no erythema, ecchymosis, swelling or tenderness. There is no evidence of shoulder girdle muscle atrophy. There is no weakness of the shoulder girdle muscles. There is no evidence of instability of the right shoulder. Impingement sign is negative.

LEFT SHOULDER: Examination of the left shoulder reveals abduction and flexion of 170 degrees (normal is 170 degrees), internal rotation to T12 (normal is to T12), external rotation of 90 degrees (normal is 90 degrees) and adduction of 45 degrees (normal is 45 degrees). There is no erythema, ecchymosis, swelling or tenderness. There is no evidence of shoulder girdle muscle atrophy. There is no weakness of the shoulder girdle muscles. There is no evidence of instability of the left shoulder. Impingement sign is negative.

RIGHT ELBOW: Examination of the right elbow reveals flexion of 0 to 160 degrees (normal is 0 to 160 degrees), pronation and supination is 180 degrees each (normal is 180 degrees). There is no swelling, erythema, ecchymosis or tenderness. There is

no muscle atrophy or instability.

LEFT ELBOW: Examination of the left elbow reveal flexion of 0 to 160 degrees (normal is 0 to 160 degrees), pronation and supination is 180 degrees each (normal is 180 degrees). There is no swelling, erythema, ecchymosis or tenderness. There is no muscle atrophy or instability.

IMPRESSION: The claimant reveals evidence of a resolved cervical hyperextension injury.

The claimant reveals no evidence of disability from any Orthopaedic injury sustained in the accident. No further Orthopaedic treatment is indicated.

Her prognosis is excellent. She is able to work without restriction. The claimant does not require any further physical therapy treatment.

Based on the foregoing, this court finds that the defendants have submitted ample proof in admissible form that plaintiff Rodriguez did not sustain a serious injury within the meaning of the statute as a result of the subject accident.

In opposition to defendants' motion Rodriguez submits, inter alia, unsworn, unaffirmed medical reports of Dr. SangHun Song, MD, a physiatrist, dated October 16, 2003, November 20, 2003, September 7, 2004; the sworn to, notarized "affirmation" of Martin Gillman, D.C., a chiropractor, who examined the plaintiff, Patricia Rodriguez, on October 14, 2003; and, the affirmed medical narrative report of Dr. I. Tetrokalashvili, M.D., who examined the plaintiff January 25, 2007, more than three and one-half years after the subject accident.

Plaintiff may not submit unsworn reports of her own examining doctor, namely, Dr. Song, in order to defeat defendants' motion for summary judgment. In the absence of such an affirmation by this physician, the aforesaid reports will not be considered by this court on the instant motion (**Lowe v. Bennett**, 122 AD2d 728, aff'd 69 NY2d 701).

The single page report of chiropractor Martin Gillman, DC, who examined Patricia Rodriguez on October 14, 2003 states, in pertinent part, as follows:

DIAGNOSIS:

- Cervical Radiculitis
- Lumbar Radiculitis
- Cervical Disc Syndrome
- Lumbar Disc Syndrome
- Acute Moderate to Severe Cervical Strain/Sprain
- Acute Moderate to Severe Thoracic Strain/Sprain
- Acute Moderate to Severe Lumbosacral Strain/Sprain
- Segmental Dysfunctions at C3, C4, C5 levels
- Segmental Dysfunctions at T2, T5, T6 levels
- Segmental Dysfunctions at L3, L4, L5 levels
- R/O Cervical and Lumbar Radiculopathies

In order to be sufficient to establish a prima facie case of serious physical injury, the affidavit must contain medical findings, which are based on the physician's own examinations, tests and observation and review of the record; Dr. Gillman's single page report herein manifests only the plaintiff's subjective complaints. Additionally, Dr. Gillman critically fails to set forth the tests relied upon to arrive at his assessment that the plaintiff sustained the foregoing diagnoses. As such, Dr. Gillman's report cannot raise a triable issue of fact as to "serious injury" (*Walters v Papenostassiou*, 31 NYS3d 439; *Vasquez v Basso*, 27 AD3d 728; *Exilus v Nicholas*, 26 AD3d 457).

Plaintiff's remaining proof, i.e., Dr. Tetrokalashvili's report of an examination of the plaintiff on January 25, 2007, more than three and one-half years after the subject accident states, in pertinent part, as follows:

PHYSICAL EXAMINATION:***

CERVICAL SPINE: Examination of the cervical spine revealed decrease range of motion in flexion 30 ° (normal 45°), in extension 35° (normal 45°), right lateral flexion 40°, left lateral flexion 35° (normal 45°), and right rotation 40°, left rotation 35° (normal 45°). Tenderness is present in paravertebral and trapezius areas on palpation and percussion.

Spurling Sign is positive.

LUMBAR SPINE: Examination of the lumbar spine revealed full range of motion.

UPPER EXTREMITIES: Examination of the upper extremities revealed normal muscle strength in deltoid, biceps and triceps muscles. No atrophy is noted. Deep Tendon Reflexes are normal. Sensation is intact.

DIAGNOSIS:

S/P MVA at 08/02/03:

1. Patient has traumatic strain.
2. Cervicalgia, radiculitis, tension, headaches which patient sustained after MVA.
3. Left hand numbness which interferes with patients everyday activities.

CAUSALTY: If the history provided is accurate, the injuries sustained by the above patient are causally related to the accident.

PROGNOSIS: The prognosis as of the patient's final consultation in regard to a full and complete recovery to a state as existed prior to the accident on 08/02/03 is guarded. The patient has experienced significant derangement of function of the lumbar spine and left hand. In this type of injury, there is a tearing of the soft tissue components, such as muscles, tendons and ligaments, which result in formation of scar tissue that will never be as flexible or elastic as the original counterparts, contributing to the limitation of motion and chronic recurrent pain syndrome.

This court cannot overlook the fact that Dr. Tetrokalashvili's affirmed report is dated more than three years after the subject accident. Moreover, plaintiff has failed to present an adequate explanation for the gap in treatment (**Grossman v. Wright**, 268 AD2d 79; **Dimenshteyn v. Caruso**, 262 AD2d 348).

Furthermore, based upon a simple and plain reading of Dr.

Tetrokalashvili's report, it is readily apparent that plaintiff had full range of motion to her lumbar spine, shoulders, wrist, hips, knees and lower extremities. While Dr. Tetrokalashvili does note a minimal five to fifteen degree loss of range of motion to the plaintiff's cervical area in virtually all planes, he states "[i]f the history provided is accurate, the injuries sustained by this patient are causally related to the accident." Based upon a reading of the report, the history provided to Dr. Tetrokalashvili was incomplete as there was no reference in any portion of the report to the incident two years prior to the subject motor vehicle accident where the plaintiff fell off a balcony and fractured her back. Accordingly, in light of the fact that Dr. Tetrokalashvili did not have a complete history of the plaintiff's prior injuries, his report is herewith disregarded in its entirety (**Frachini v. Palmieri**, 1 NY3d 536; **Behm v. Rodoccia**, 6 AD3d 473; **Kupka v. Emmerich**, 2 AD3d 595).

Accordingly, defendants' motion for summary judgment dismissing the complaint on the ground that the injured plaintiff Rodriguez did not sustain a serious injury within the meaning of Insurance Law §5102(d) is granted (**Grasso v. Angerami**, 79 NY2d 813).

Dated: APR 20 2007

W. Kelly
J.S.C

ENTERED

APR 25 2007

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**